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ONG YEW TEIK v. NG WAI PIN & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
HASHIM HAMZAH JCA
COLLIN LAWRENCE SEQUERAH JCA

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[CIVIL APPEAL NOS: W-02(IM)(NCvC)-1194-06-2022, W-02(IM)(NCVC)-1195-06-2022, W-02(IM)(NCVC)-1196-06-2022 & W-02(IM)(NCVC)-1197-06-2022]
25 NOVEMBER 2024

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Abstract – *(i) When one peruses a statement of claim as a whole and finds the claimant has set out facts and circumstances as well as allegations that there were fraudulent and unlawful acts, it merits at the very least an examination of whether malicious prosecution arose. Such cause of action is hardly suited for a summary mode of disposal;*

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(ii) When damages claimed in an earlier suit has no correlation with a present claim, the principle of res judicata and/or estoppel in its wider sense does not apply.

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CIVIL PROCEDURE: *Striking out – Appeal against – Action for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and malicious prosecution – Whether claim concerned evidence presented in earlier suit – Whether claim barred by res judicata – Whether there was attempt to re-open issues in new suit – Whether there were serious causes of action that warranted documentary and witness evidence to be determined before court – Whether cause of action suited for summary mode of disposal*

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CIVIL PROCEDURE: *Action – Cause of action – Action for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and malicious prosecution – Whether claim concerned evidence presented in earlier suit – Whether claim barred by res judicata – Whether there was attempt to re-open issues in new suit – Whether there were serious causes of action that warranted documentary and witness evidence to be determined before court – Whether cause of action suited for summary mode of disposal*

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The appellant ('plaintiff') commenced an action against the first defendant ('Suit 1333') in the High Court to recover the debt pursuant to an acknowledgment of debt signed by the first defendant. The first defendant filed his defence and counterclaim, disputing the debt by denying that he had signed the acknowledgment of debt. After a full trial, the High Court dismissed the plaintiff's claim against the first defendant. Upon appeal, the Court of Appeal allowed the plaintiff's appeal and entered judgment against the first defendant in favour of the plaintiff's claim ('Appeal 1694'). In doing so, the Court of Appeal found, *inter alia*, that the evidence at trial proved

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convincingly that the first defendant did sign the acknowledgment of debt. The first defendant thereafter appealed to the Federal Court wherein leave was dismissed and subsequently, the first defendant's application to review the Federal Court decision was also dismissed ('Federal Court proceedings'). In the aftermath of the proceedings in Suit 1333, the plaintiff discovered that there were multiple wrongful and lawful actions and conducts committed by the defendants to defraud, hinder and complicate the progress of Suit 1333 and that such actions of the first defendant were abetted and aided by the other defendants. It was alleged that the second defendant, together with the first defendant, had conspired to support the fabricated and false facts alleged by the first defendant. Among the wrongful and unlawful conducts by the fourth defendant and the first defendant, together with the other defendants, include intimidation and coercion of witnesses, fabrication and/or forgery of documents, use of fabricated documents, preparing false affidavits, witness statements, submissions and reply submissions and conspiracy with witnesses to injure the plaintiff and the plaintiff's case. In addition to the above, the sixth defendant, together with the first defendant, had also conspired with the third and fifth defendants to dupe, coerce and manipulate witnesses. As such, the plaintiff commenced an action against the second defendant and the other defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant. The defendants filed striking out applications against the plaintiff's suit. The High Court, in allowing the striking out applications, held, *inter alia*, that the facts that the plaintiff relied on, namely the alleged fraudulent evidence presented at trial, were all available during Suit 1333. As such, the High Court found that the plaintiff's claim was barred by the doctrine of *res judicata*. Hence, these appeals by the plaintiff arising out of the striking out applications.

Held (allowing appeals)
Per Collin Lawrence Sequerah JCA delivering the judgment of the court:

(1) Suit 1333 was only against the first defendant and it was premised on the breach of the acknowledgment of debt. The issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or Appeal 1694. The second, third, fourth and fifth defendants were fresh parties to this suit and the plaintiff had never sought damages against them in Suit 1333. The plaintiff's present claim had not occurred when Suit 1333 was filed and the alleged fraudulent evidence and/or fabricated documents and/or the fraudulent actions of the defendants were not within the plaintiff's knowledge at the stage prior to the close of pleadings. These issues could not be raised during Suit 1333 and was also not a subject and/or issue in Suit 1333 (paras 61-64)

(2) The plaintiff's present claim was not based on the facts of Suit 1333 namely the acknowledgment of debt but on the fraudulent and deliberate actions or conduct of the second defendant and the other defendants to conspire unlawfully to procure, fabricate and create false evidence to injure the plaintiff. The plaintiff's present case was not to determine the truth of the witnesses' statements in Suit 1333 but rather whether the witnesses had conspired unlawfully to give false evidence or fabricate evidence in order to injure the plaintiff during Suit 1333 and whether the conduct or acts of the second defendant together with the other defendants in Suit 1333 were unlawful. The damages claimed in Suit 1333 by the plaintiff had no correlation with the present claim as the claim in Suit 1333 was in relation to a breach of the acknowledgment of debt, while the damages prayed for in the statement of claim were damages suffered by the plaintiff due to the fraudulent and unlawful actions of the second defendant and the other defendants. Therefore, the principle of *res judicata* and/or estoppel in its wider sense did not apply to the plaintiff's present claim. (paras 65-68)

(3) When one perused the statement of claim as a whole, the plaintiff had set out the facts and circumstances where the second defendant and the first defendant, together with the other defendants, had committed such fraudulent and unlawful acts against the plaintiff. It was also alleged and averred that the first defendant had intentionally and knowingly, colluded and conspired with the second defendant, and the other defendants, to injure the plaintiff throughout the course of Suit 1333 including conspiring to make a fraudulent counterclaim. From the perusal of the pleadings as a whole, it merit at the very least an examination of whether the first defendant's counterclaim and defence in Suit 1333 amounted to malicious prosecution. Given the numerous allegations and multiple facts alleged, the cause of action brought by the appellant was hardly suited for a summary mode of disposal. (paras 74-78)

(4) The courts in the United Kingdom have recognised and accepted that there are exceptions to the witness immunity principle and that such protection should not be a blanket protection in all circumstances without due consideration and appreciation of the facts of the claim. There was thus at least some basis for an examination or inquiry as to whether the exceptions to the witness immunity principle ought to be similarly extended in our jurisdiction. (paras 89-91)

(5) Based upon an examination of the amended pleading and the causes of action alleged, namely tort of conspiracy to injure by unlawful means, fraud with particulars pleaded, tort of abuse of the process of court and malicious prosecution all of which were also particularised, this was not a case which was so obviously unsustainable which would warrant a striking out. (para 92)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Darker (Personal Representative Of David Stanley Docker, Deceased) And Others v. Chief Constable Of The West Midlands Police [2000] 3 WLR 747 ***(refd)***

Goldsmith v. Sperrings Ltd & Ors [1977] 1 WLR 478 ***(refd)***

Saripah Manap & Ors v. Emar Sdn Bhd & Ors [1997] 4 CLJ 194 HC ***(refd)***

Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors [2018] 5 CLJ 619 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)(a), (d)

(Civil Appeal No: W-02(IM)(NCVC)-1194-06-2022)
For the appellants - Roshan Selvaratnam; M/s Roshan
For the respondents - Ng Wai Pin; M/s Elizabeth Lau

(Civil Appeal No: W-02(IM)(NCVC)-1195-06-2022)
For the appellants - Roshan Selvaratnam; M/s Roshan
For the respondents - Wong Yoke Yen; M/s Kit & Assocs

(Civil Appeal No: W-02(IM)(NCVC)-1196-06-2022)
For the appellants - Roshan Selvaratnam; M/s Roshan
For the respondents - Michael Gunalan Benedict & Wong Fook Lin; M/s Surendra Ananth

(Civil Appeal No: W-02(IM)(NCVC)-1197-06-2022)
For the appellants - Roshan Selvaratnam; M/s Roshan
For the respondents - Kamal YP Tan; M/s Robert Low & Ooi

[Editor's note: For the High Court judgment, please see Ong Yew Teik v. Kamal YP Tan & Ors [2022] CLJU 1328; [2022] 1 LNS 1328 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JCA:

Introduction

[1] All these appeals were heard together. After hearing parties and considering the submissions, we unanimously allowed all the appeals.

[2] The learned Chairman of the panel, YA Dato' Seri Kamaluddin, has since retired. My learned brother, YA Dato' Hashim Hamzah, has approved the draft of this judgement.

[3] All these appeals arise out of the orders of the Kuala Lumpur High Court dated 14 June 2022, wherein the High Court allowed the second defendant's (respondent) application dated 1 September 2021 pursuant to O. 18 r. 19(1)(a), of the Rules of Court 2012 to strike out the appellant's/plaintiff's suit ("striking out application").

[4] The first, third, fourth and fifth defendants (respondents) of the suit had filed similar striking out applications against the appellant's/plaintiff's suit and the learned High Court Judicial Commissioner (JC), having heard all four striking out applications together, had allowed all four striking out applications on 14 June 2022.

[5] The resulting appeals by the appellant/plaintiff arising out of these striking out applications are as follows:

(i) W-02(IM)(NCvC)-1194-06/2022 (second defendant's striking out application) ("1194 Appeal");

(ii) W-02(IM)(NCvC)-1195-06/2022 (fourth defendant's striking out application) ("1195 Appeal");

(iii) W-02(IM)(NCvC)-1196-06/2022 (third and fifth defendant's striking out application) ("1996 Appeal"); and

(iv) W-02(IM)(NCvC)-1197-06/2022 (first defendant's striking out application) ("1197 Appeal").

[6] For ease of reference and to avoid confusion, the parties, save for the appellant/plaintiff, will be referred to in their respective capacities as they were in the High Court.

Background Facts

[7] The appellant/plaintiff commenced an action against the first defendant in the High Court of Kuala Lumpur *vide* Civil Suit No: S5-22-1333-2007 ("Suit 1333") to recover the debt pursuant to an acknowledgment of debt signed by the first defendant.

[8] The first defendant filed his defence and counterclaim dated 13 February 2008. In the first defendant's defence and counterclaim to Suit 1333, he averred, *inter alia*, the following:

(i) disputed the debt by denying that he had signed the said acknowledgment of debt;

(ii) that if contrary to the first defendant's contention, it be held that he did sign the acknowledgment of debt, the acknowledgment of debt was null and void upon a failure of consideration as there was no debt and still no debt due from the first defendant to the appellant/plaintiff;

(iii) that if contrary to the first defendant's contention, it be held that he did sign the acknowledgment of debt, he was induced by the appellant/plaintiff's representations into signing an undated acknowledgment of debt sometime in August 2006 and that he had delivered it to the appellant/plaintiff in escrow upon terms that it was subject to conditions precedent (which were not fulfilled);

(iv) that the appellant/plaintiff was not the absolute beneficial owner of the 271,600 shares of Euroceramic Technologies Companies Ltd (ECT). The said shares at all material times legally and beneficially belonged to the appellant's/plaintiff's uncle, namely Yue Sau Yin ("Roger Yue");

(v) that the first defendant only discovered for the first time that the appellant/plaintiff was not the absolute beneficial owner of the said shares when a copy of a letter dated 4 September 2006 from Roger Yue was shown to him;

(vi) that the appellant/plaintiff was not able to transfer and register the said shares in the first defendant's name free from all claims and encumbrances;

(vii) that the shares were only valued at RM4,300,000;

(viii) that the first defendant had signed on an undated acknowledgment of debt, of which had subsequently been unilaterally altered by the appellant/plaintiff by inserting the words "6 November 2006" and therefore, the acknowledgment of debt had become null and void; and

(ix) instead, the appellant/plaintiff owed him a sum of RM3,584,211.42 for alleged personal loans.

[9] After a full trial, the High Court dismissed the appellant's/plaintiff's claim against the first defendant and allowed the first defendant's counterclaim with costs of RM70,000.

[10] Upon appeal, the Court of Appeal by a majority, allowed the appellant's/plaintiff's appeal and entered judgment against the first defendant in favour of the appellant/plaintiff's claim and set aside the High Court judgment ("1694 Appeal").

[11] The Court of Appeal in doing so made, *inter alia*, the following findings:

(i) there is abundant evidence to show that the first defendant's claim that he signed the acknowledgment of debt in escrow in August 2006 is inherently improbable;

(ii) the emails exchanged between the second defendant and Yeap Hong Imm (the plaintiff's lawyer) were genuine;

(iii) the evidence at trial proved convincingly that the first defendant did sign the acknowledgment of debt on 6 November 2006;

(iv) the evidence led by the appellant/plaintiff firmly sustained his claim that the acknowledgment of debt was indeed signed on 6 November 2006;

(v) the letter of pre-agreement dated 26 October 2006 explained how the acknowledgment of debt dated 6 November 2006, the acknowledgment of payment for Lot 6 Tropicana dated 6 November 2006 and the acknowledgment of payment of personal loans dated 6 November 2006 came to be drawn up and signed;

(vi) the appellant's/plaintiff's witnesses, which included Choa Swee Lin ("Choa") (PW2), Warayut Amornpongchai ("Warayut") (PW3), Edward Mosses a/l Julius Josephath ("Edward") (PW4) and Kong Ah Choo ("Kong") (PW5) were not ordinary employees of ECT, but were either shareholders, directors or persons within ECT who had real and relevant information on the share dealing, and that their testimonies were consistent between themselves and with the appellant's/plaintiff's case;

(vii) Roger Yue was the appellant's/plaintiff's nominee shareholder in ECT, and Roger Yue was also the nominee of several other shareholders;

(viii) the tripartite agreement amongst the appellant/plaintiff, Roger Yue and the first defendant existed, that resulted in the appellant/plaintiff first transferring his ECT shares to Roger Yue on 31 October 2006, and that on the following day, *ie*, 1 November 2006, Roger Yue transferred those same shares to the first defendant pursuant to the sale and purchase agreement entered into between the first defendant and Roger Yue;

(ix) following the transfer of the appellant's/plaintiff's ECT shares by Roger Yue to the first defendant, on 1 November 2006, the first defendant informed the appellant's/plaintiff's then solicitors on the adjustments to be made to the amount mentioned in all three acknowledgments in line with the letter of pre-agreement;

(x) there were no pre-conditions for the execution and depositing of the acknowledgment of debt by the first defendant as alleged by him;

(xi) with the timeline and the several matters that had to be organised and attended to before any transfer of the appellant's/plaintiff's ECT shares could be made, the appellant's/plaintiff's case that on 6 November 2006, the first defendant signed all three acknowledgments, which contained the adjusted sums, was clearly the version that was proved; and

(xii) the first defendant had not proved his counterclaim against the appellant/plaintiff, even on the balance of probabilities.

[12] The first defendant thereafter appealed to the Federal Court wherein leave was dismissed and subsequently, the first defendant's application to review the Federal Court decision was also dismissed ("Federal Court proceedings").

[13] In the aftermath of the proceedings in Suit 1333, the appellant/plaintiff discovered that there were multiple wrongful and unlawful actions and conducts committed by the defendants to defraud and hinder and complicate the progress of Suit 1333 and that such actions of the first defendant were abetted and aided by the other defendants.

[14] It was alleged that the second defendant together with the first defendant had conspired to support the fabricated and false facts alleged by the first defendant.

[15] Among the wrongful and unlawful conduct by the fourth defendant and the first defendant together with the other defendants includes intimidation and coercion of witnesses, fabrication and/or forgery of documents, use of fabricated documents, preparing false affidavits, witness statements, submissions and reply submissions and conspiracy with witnesses to injure the appellant/plaintiff and the appellant's/plaintiff's case.

[16] In addition to the above, the sixth defendant together with the first defendant had also conspired with the third and fifth defendants to dupe, coerce and manipulate the following witnesses (who have since recanted and have filed police reports against the first defendant and the sixth defendant, amongst others) to abet and support the first defendant's false and fabricated facts:

(i) Kong Ah Choo ("Kong");

(ii) Edward Mosses Julius Josephath ("Edward") (deceased); and

(iii) Law Swee Haw ("Law").

[17] As such, the appellant/plaintiff had commenced an action against the second defendant and the other defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant.

[18] The defendants filed striking out applications against the appellant's/plaintiff's suit.

Findings Of The High Court

[19] The High Court in allowing the striking out applications held, *inter alia*, the following.

[20] The facts that the appellant/plaintiff relies on namely, the alleged fraudulent evidence presented at trial, alleged perjury, alleged false affidavits and submissions filed by the first defendant with the alleged assistance of the other defendants, were all available during Suit 1333.

[21] There are no valid reasons presented by the appellant/plaintiff that prevented him or his counsel from filing a claim based on the tort of abuse of process against the first defendant in Suit 1333. This could have and should have been undertaken in Suit 1333, at the very least as an answer to the counterclaim filed by the first defendant.

[22] As such, the learned JC found that for the tort of abuse of process and the inter-related fraud alleged against the defendants, the claim is barred by the doctrine of *res judicata*. The appellant/plaintiff should have and could have instituted the claims against the defendants for the alleged tort of abuse of process in the same Suit 1333.

[23] Although the second defendant and the third to sixth defendants were not parties to Suit 1333, this does not mean that the doctrine of *res judicata* does not apply to those who were not a party to the earlier suit.

[24] There are circumstances where the doctrine is legitimately extended not only to parties who were party to the earlier suit but also may apply to those who are privy to the parties involved in the earlier suit.

[25] The learned JC found that it is abusive for the appellant/plaintiff to now attempt to re-open the issues again in this new suit. The claim against the second defendant and the third to sixth defendants all concerns evidence that was presented in the earlier suit and the damages claimed are all relating to the failure of the first defendant to pay the principal sum of RM8 million expeditiously.

[26] The learned JC said that the alleged perjury and alleged fraudulent representation of evidence by the defendants were before the High Court and were eventually dealt with by the Court of Appeal. This can be seen in paras. 35 to 62 and 65 to 73 of the grounds of the Court of Appeal dated 10 January 2019, delivered by Mary Lim JCA (as she then was).

[27] It cannot, therefore, be said that these issues were not before the court in Suit 1333. To allow the appellant/plaintiff to re-open this issue would be contrary to the principle of *res judicata*.

[28] The learned JC found that the appellant/plaintiff is barred from pursuing the claim based on the tort of abuse of process against the second defendant, first, third, fourth and fifth defendants.

[29] The learned JC further found that the tort of malicious prosecution is limited to claims that arise in proceedings that question the financial credit of a litigant such as that arising in bankruptcy and winding-up claims.

[30] The learned JC found that the tort of malicious prosecution does not extend to the allegations raised by the appellant/plaintiff against the defendants and hence, the claim based on tort of malicious prosecution should be struck out.

[31] However, the learned JC found that the appellant/plaintiff had sufficiently pleaded the necessary elements for the tort of conspiracy against the second defendant and the other defendants. Therefore, the learned JC declined to exercise his discretion to strike out the claim for conspiracy on this ground.

[32] The learned JC found that the tort of fraud based on the perjury in the earlier suit, as suggested by the appellant/plaintiff, does not exist under Malaysian laws, and therefore, exercised his powers to strike out the aforesaid claim against the defendants that is grounded on this alleged tort.

[33] The learned JC opined that based on the current legal position under Malaysian law, the defendants are entitled to rely on the defence of witness immunity.

[34] The learned JC opined that the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants. The defendants do not owe any duties to the appellant/plaintiff and the statements or evidence presented in Suit 1333 and the statements were made during legal proceedings. The said immunity remains valid in favour of the defendants. Hence, the claims against the defendants should be struck out.

[35] The learned JC found that it is an abuse of process of the court to allow the appellant/plaintiff to attempt to claim new damages against the defendants based on the same failure to pay the sum of RM8,018,225 that was earlier pursued in Suit 1333. The appellant/plaintiff should have and could have raised these damages in the earlier suit, at least against the first defendant.

Parties Submissions

Appellant

[36] In summary, the appellant submitted that during the course of proceedings of Suit 1333, the appellant/plaintiff discovered that there were multiple wrongful and unlawful actions and conducts committed by the defendants to defraud and hinder and complicate Suit 1333 and such actions of the second defendant were abetted and aided by the other defendants.

[37] The defendants together with the second defendant had conspired therefore to support the fabricated and false facts alleged by the first defendant.

[38] Among the wrongful and unlawful conduct by the second defendant and the other respondents/defendants includes intimidation and coercion of witnesses, fabrication and/or forgery of documents, use of fabricated documents, preparing false affidavits, witness statements, submissions and reply submissions and conspiracy with witnesses to injure the appellant/plaintiff and the appellant's/plaintiff's case.

[39] In addition to the above, the sixth defendant together with the first defendant had also conspired with the third and fifth defendants to dupe, coerce and manipulate the witnesses (who have since recanted and have filed police reports against the first defendant and the sixth defendant, amongst others) to abet and support the first defendant's false and fabricated facts.

[40] As a result, the appellant/plaintiff had commenced an action against the defendants for fraud, tort of conspiracy to injure by unlawful means, tort of abuse of court process and additionally, malicious prosecution against the first defendant.

[41] The appellant submitted that all these constitute serious causes of actions that warrant documentary and/or witness evidence to be determined before the court and cannot be summarily struck out.

[42] The appellant also submitted that the learned JC had erred in finding that the claim is barred by *res judicata* because Suit 1333 was only against the first defendant and it was premised on the breach of the acknowledgment of debt.

[43] The issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or the 1694 Appeal.

[44] The second defendant, third, fourth and fifth defendants are new parties to this lawsuit and the appellant/plaintiff had never sought damages against them in Suit 1333.

Respondents (Defendants)

[45] All the defendants more or less adopted common stands during the course of submissions.

[46] In summary, it was submitted that the appellant's/plaintiff's claim does not disclose any cause of action against the second defendant because it is trite law that a witness in judicial proceedings is accorded absolute immunity from civil suits in respect of evidence given during court proceedings and that immunity extends to evidence given on affidavit.

[47] Therefore, based on the current legal position under Malaysian law, the defendants are entitled to rely on the defence of witness immunity and the exceptions to the general rule of immunity do not apply to the pleaded case against the defendants.

[48] It was further submitted that the respondents/defendants do not owe any duties to the appellant/plaintiff as the statements or evidence presented at the Suit 1333 were made during legal proceedings.

[49] It was submitted therefore that this was a plain and obvious case for the claims against the second defendant to be struck out.

[50] The respondents also submitted that the plaintiff's claim against the second defendant was nothing more than a civil action in respect of evidence that the second defendant had given during the Suit 1333.

[51] The pleadings averred by the appellant/plaintiff against the defendants is that they had conspired to make false statements and/or fabricated evidence in respect of the Suit 1333.

[52] It was pointed out that the alleged false defence and counterclaim in the Suit 1333 was filed by the first defendant way back in 13 February 2008 and any allegation of abuse could or should have been raised in the same proceedings, either under O. 18 r. 19(1)(d) or as an answer to the counterclaim in the Suit 1333.

[53] The allegedly false affidavits and evidence already existed at the time of the 1333 Suit and were before the court in the Suit 1333 and the alleged loss and damages arising from non-payment or delay in payment of the RM8,018,225 could or should have been raised in the Suit 1333.

[54] These claims were thus barred by the doctrine of *res judicata* and amounted to an abuse of process as they either have been, or could and should have been, raised and decided in the Suit 1333.

[55] It was submitted that the learned JC correctly held that the tort of malicious prosecution is limited to malicious institution of criminal prosecutions and is not generally available in civil proceedings except in bankruptcy and winding-up proceedings in Malaysia.

[56] It was further submitted that the learned JC correctly held that Malaysian common law as it stands does not recognise a general tort of fraud based on the alleged perjury in the Suit 1333.

[57] The learned JC had therefore not erred in striking out the actions.

Analysis And Findings

The Law On Striking Out

[58] The principles governing the striking out of pleadings under O. 18 r. 19(1) of the Rules of Court 2012 are well-settled and a court will only allow for striking out in plain and obvious cases. See *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.

[59] In *Saripah Manap & Ors v. Emar Sdn Bhd & Ors* [1997] 4 CLJ 194; [1998] 1 MLJ 323:

> In fact, all these issues above are intertwined with legal questions that merit some serious consideration on my part. A summary procedure under O. 18 r. 19(1)(a) and (b) should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. *If it can*

A *be shown that the pleadings do disclose some cause of action or have raised some questions fit to be decided, however slight the chances are of succeeding, that case should not be struck off.*

(emphasis added)

[60] Having the basic principles with regard to the law on striking out in
B the forefront of our minds, we proceeded to consider the issues raised during the appeal and came to the following findings.

Res judicata

[61] Upon a consideration of the submissions by both parties, we find that
C Suit 1333 was only against the first defendant, and it was premised on the breach of the acknowledgment of debt.

[62] The issues of fraud, conspiracy by way of unlawful means and/or tort of abuse of process and/or malicious prosecution were never mentioned and/or submitted and/or decided in Suit 1333 and/or the 1694 Appeal.

D **[63]** The second defendant, third, fourth and fifth defendants are fresh parties to this lawsuit and the appellant/plaintiff had never sought damages against them in Suit 1333.

[64] The appellant's/plaintiff's present claim had not occurred when Suit
E 1333 was filed and the alleged fraudulent evidence and/or fabricated documents and/or the fraudulent actions of the defendants were not within the appellant's/plaintiff's knowledge at the stage prior to the close of pleadings. These issues could not be raised during Suit 1333 and was also not a subject and/or issue in Suit 1333.

F **[65]** The appellant's/plaintiff's present claim is not based on the facts of Suit 1333, namely the acknowledgment of debt and/or the ownership of the ECT shares but on the fraudulent and deliberate actions or conduct of the second defendant and the other defendants to conspire unlawfully to procure, fabricate and create false evidence to injure the appellant/plaintiff.

G **[66]** The appellant's/plaintiff's present case is not to determine the truth of the witnesses' statements in Suit 1333 but rather whether the witnesses had conspired unlawfully to give false evidence or fabricate evidence in order to injure the appellant/plaintiff during Suit 1333 and whether the conduct or acts of the second defendant together with the other defendants in Suit 1333
H were unlawful.

[67] The damages claimed in Suit 1333 by the appellant/plaintiff has no correlation with the present claim as the claim in Suit 1333 was in relation to a breach of the acknowledgment of debt, while the damages prayed for in paras. 72 to 74 of the statement of claim are damages suffered by the
I appellant/plaintiff due to the fraudulent and unlawful actions of the second defendant and the other defendants.

[68] We therefore find that the principle of *res judicata* and/or estoppel in its wider sense does not apply to the appellant's/plaintiff's present claim.

Tort Of Malicious Prosecution

[69] The gist of the complaint or grievance of the appellant in the current suit is that the second defendant had abused the court process by producing and creating false evidence and committing the act of witness intimidation in order to mislead the court and to injure the appellant/plaintiff.

[70] It was further alleged that the first defendant had also initiated a false counterclaim against the appellant/plaintiff in order to injure the appellant/plaintiff and the first defendant was successful in misleading the High Court into allowing the first defendant's false counterclaim.

[71] In particular, it was averred that in the course of the proceedings in Suit 1333, the first defendant had conspired with the second defendant and the other defendants to support the false claims and/or fabrication of facts alleged by the first defendant in the affidavits and/or testimonies of the second defendant and the other defendants and/or by producing and/or using fabricated documents in order to cause injury to the appellant/plaintiff *ie*, to defraud the appellant/plaintiff, and hinder and/or delay the proceedings of Suit 1333.

[72] It was submitted that instances of the creation and production of fake and/or false documents were as follows:

(i) the "new" or newly created share registry of ECT;

(ii) the alleged Montri report by one Montri Benjadani; and

(iii) the letters of irrevocable instructions.

[73] The substratum of the appellant's claim in the High Court therefore was that the false affidavits, fabrication of facts and use of and fabrication of documents was the plan and/or strategy for the conspiracy throughout Suit 1333.

[74] When one peruses the statement of claim as a whole, the appellant/plaintiff had set out the facts and circumstances where the second defendant and the first defendant together with the other defendants had committed such fraudulent and unlawful acts against the appellant/plaintiff.

[75] In the statement of claim, it is further pleaded that the second defendant and the first defendant together with the other defendants had given fraudulent and false facts and/or fabricated documents both in their affidavits and/or testimonies in order to assist the first defendant's intention to defraud and injure the appellant/plaintiff, *ie*, to prevent the appellant/plaintiff from enforcing his rights under the acknowledgment of debt and to avoid paying a due debt and making a false counterclaim against the appellant/plaintiff.

[76] It is also alleged and averred that the first defendant had intentionally and knowingly, colluded and conspired with the second defendant and the other defendants to injure the appellant/plaintiff throughout the course of Suit 1333, including conspiring to make a fraudulent counterclaim.

[77] From a perusal of the pleadings as a whole, it merits at the very least an examination of whether the first defendant's counterclaim and defence in Suit 1333, amounts to a malicious prosecution.

[78] Given the numerous allegations and multiple facts alleged, the cause of action brought by the appellant is hardly suited for a summary mode of disposal.

[79] It would necessarily involve a minute examination and consideration of the affidavits and documentation as well as the testimony of witnesses in order to come to a determination or finding of the strength of the appellant's claim.

[80] The High Court further held that a claim for malicious prosecution is only confined to cases of winding-up and bankruptcy proceedings.

[81] The High Court had, with the greatest of respect, failed to consider that abuse of court process and that of malicious prosecution is actionable under the law of tort.

[82] See *Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors* [2018] 5 CLJ 619; [2017] MLJU 1674, which quoted the dissenting judgment of Lord Denning MR in *Goldsmith v. Sperrings Ltd & Ors* [1977] 1 WLR 478 as follows:

> It is an actionable tort, according to Lord Denning MR, *if the legal process is abused in order to instead oppress or extort, or exert pressure to achieve an improper end.* This formulation has since been adopted in Malaysia, in the leading authority on the law governing the tort of abuse of process in the Court of Appeal decision in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 which in the judgment delivered by Gopal Sri Ram JCA (as he then was) held that *the essence of the law is that it is an abuse of process where the process of the Court is invoked not for the genuine purpose of obtaining relief claimed, but for a collateral purpose, such as to oppress a defendant*.
>
> (emphasis added)

[83] We find therefore that the High Court had erred in finding that a claim for malicious prosecution is only confined to cases of winding-up and bankruptcy proceedings.

[84] Despite the fact that the learned judge had recognised that the appellant/plaintiff had sufficiently pleaded the necessary elements for tort of conspiracy, he declined to exercise his discretion to strike out the claim for conspiracy.

[85] With the greatest of respect, we find that the learned judge had erred in this respect also.

The Witness Immunity Rule

[86] In the course of overturning the decision of the High Court and allowing the appellant's/plaintiff's claim in Suit 1333, the Court of Appeal made several telling remarks and/or findings in relation to the conduct of the first defendant, *inter alia*, that he had contradicted himself several times, that his claim was inherently improbable, that his contentions were "untenable and untrue" and that he was "extremely economical with the truth".

[87] The appellant also averred that the conduct or acts of the second defendant and that of the other defendants and the witnesses were such that they have collaborated and conspired with each other and acted to fabricate or create false evidence to support a fabricated fact alleged by the first defendant in Suit 1333.

[88] The High Court held that the witness immunity principle extends only to the contents of the evidence provided by the witness but does not extend to the act of the witness collecting material on which he may later be called to give evidence and particularly does not extend to where the witness deliberately creates or procure false evidence for their interest of providing false evidence in court.

[89] The learned JC in that respect had erred when he failed to realise that the courts in the United Kingdom have recognised and accepted that there are exceptions to the witness immunity principle and that such protection should not be a blanket protection in all circumstances without due consideration and appreciation of the facts of the claim.

[90] See *Darker (Personal Representative Of David Stanley Docker, Deceased) And Others v. Chief Constable Of The West Midlands Police* [2000] 3 WLR 747.

[91] There is thus at least some basis for an examination or inquiry as to whether the exceptions to the witness immunity principle ought to be similarly extended in our jurisdiction.

Decision

[92] We find that based upon an examination of the amended pleading and the causes of action alleged, namely tort of conspiracy to injure by unlawful means, fraud with particulars pleaded, tort of abuse of the process of court and malicious prosecution, all of which were also particularised, this is not a case which is so obviously unsustainable which would warrant a striking out.

A **[93]** We find that the learned JC had therefore erred in striking out the appellant's/plaintiff's claims against the defendants.

[94] We therefore set aside the order of the learned JC. All these appeals are therefore allowed.

B **[95]** We remit all the cases back to the High Court for full trial with costs of RM60,000 for each appeal subject to the allocatur.

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